Supreme Court, U.S.
FILED

961144 JAN 17 1997

OFFICE OF THE CLERK

No. ____

In The

# Supreme Court of the United States

October Term, 1996

FRED DAVIS,

*Petitioner,*

v.

SERVICE EMPLOYEES INTERNATIONAL UNION AFL-CIO, CLC & LOCAL 410, JOSEPH BUCKLEY, et al.,

*Respondents.*

Petition For Writ Of Certiorari
To The First Circuit Court Of Appeals

## PETITION FOR WRIT OF CERTIORARI

FRED DAVIS
353 BRYANT STREET
MALDEN, MASSACHUSETTS 02148
(617) 322-8223

## ISSUES PRESENTED

I.

Should this court grant certiorari to resolve the issues of errors in law and misrepresenting the facts in which their decision was based.

II.

The Appeals Court committed an error in law in dismissing the Petitioner's action.

III.

The Court committed an error in law in dismissing Local #410 from the action.

IV.

The Court committed an error in law when it denied Petitioner's Motion For Judgment Against all Defendants.

V.

The Court committed an error in law when it did not place Sanctions on the defendants for failure to obey a Court Order.

VI.

Are the Courts denying justice to Pro Se litigants?

VII.

Petitioner was deprived of his Constitutional Rights of due process of the law and equal protection of the law.

## TABLE OF CONTENTS


| | Page |
|---|---|
| OPINIONS BELOW..... | 1 |
| JURISDICTION..... | 1 |
| CONSTITUTIONAL PROVISIONS INVOLVED..... | 2 |
| STATEMENT OF THE CASE..... | 2 |
| REASONS FOR GRANTING THE PETITION..... | 5 |
| I. CERTIORARI SHOULD BE GRANTED BECAUSE THE APPEALS COURT COMMITTED AN ERROR IN LAW IN DISMISSING THE ACTION AND THEIR DECISION WAS ALSO BASED ON ERRORS IN THE FACTS OF THE CASE..... | 5 |
| II. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT COMMITTED AN ERROR IN LAW IN DISMISSING LOCAL #410 FROM THE ACTION..... | 9 |
| III. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT COMMITTED AN ERROR IN LAW WHEN IT DENIED PETITIONER'S MOTION FOR JUDGMENT AGAINST ALL DEFENDANTS..... | 10 |
| IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT COMMITTED AN ERROR IN LAW WHEN IT DID NOT | |

**TABLE OF CONTENTS**
(continued)


| | | Page |
|---|---|---|
| IV. | (continued)<br>PLACE SANCTIONS ON THE DEFENDANTS FOR FAILURE TO OBEY A COURT ORDER AND FEDERAL RULES OF CIVIL PROCEDURE..... | 11 |
| V. | CERTIORARI SHOULD BE GRANTED BECAUSE THE COURTS ARE DENYING JUSTICE TO PRO SE LITIGATES..... | 12 |
| VI. | CERTIORARI SHOULD BE GRANTED BECAUSE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS OF DUE PROCESS OF THE LAW AND EQUAL PROTECTION OF THE LAW..... | 13 |
| CONCLUSION..... | | 15 |

## OTHER


| | Page |
|---|---|
| UNITED STATES CONSTITUTION | |
| AMENDMENT V..... | 2,13 |
| AMENDMENT XIV..... | 2,13 |
| FEDERAL RULES OF CIVIL PROCEDURE | |
| RULE 26 (f)..... | 11 |
| RULE 26.2 (a)..... | 11 |
| SUFFOLK COUNTY SHERIFF..... | 10 |

Petitioner, Fred Davis, respectfully prays that a writ of certiorari issue to review decision of the United States First District Court and grant the order that the respondent Service Employees International Union AFL-CIO, CLC & Local 410, be ordered to pay the petitioner the sum of four hundred thousand dollars ($400,000.00) for damages. Respondent Joseph Buckley, be ordered to pay the petitioner the sum of four hundred thousand dollars for damages. Punitive damages in the amount of nine hundred thousand dollars ($900,000.00). Legal fees and costs/ or as an alternative a trial by jury and any other relief this court deems appropriate.

---

## OPINIONS BELOW

The lower Court's ruling was for repondents and is attached Appendix C.

The Appeals Court decision was in favor of the respondents, and is attached Appendix E.

---

## JURISDICTION

October 23, 1996, the United States Court of Appeals for the First Circuit's decision was for the respondents. This petition is filed within 90 days of the United States Court of Appeals for the First Circuit's decision.

This Court's jurisdiction is invoked under 28 United States Code.

## CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution Amendment V: states in pertinent part: "cannot be deprived of life, liberty, or property without due process of law"

The United States Constitution Amendment XIV states: " All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any State deprive any person of life, liberty or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws"

---

## STATEMENT OF THE CASE

The appellant, Fred Davis was a union member of the Service Employees International Union, AFL-CIO-CLC, Local 410 (SEIU) for approximately twenty six years, a member in good standing and all union dues have been paid, and is attached Appendix A.

The respondents used the pretext that petitioner's dues were not paid in order to discriminate against him because of this age and religion.

The petitioner was continuously discriminated because of his age and religion.

The respondents refused to represent him when he was denied promotions, while on the other hand the respondents represented all other members who were younger than the petitioner and of a different religious affiliation than the respondent.

June 22, 1994, the petitioner telephoned the union and spoke with Joseph Buckley asking him to take action on his behalf to secure his job back, however, he refused.

Respondent Buckley used profanity. He said, "you did not pay your f--- unions dues for several years and you can f---sue me, if you don't pay your f---union dues I won't talk to you and hung up".

Petitioner's union dues were paid in full and evidence of cancelled checks is attached Appendix A.

Petitioner was discriminated against because of his age and religion. Petitioner is the only union member that was discharged and the union took no action to obtain his job back.

All other members that the union represented were younger than the appellant and of different religious affiliation than the petitioner.

Petitioner filed a Complaint, with the Equal Employment Opportunity Commission. The respondents did not answer the Petitioner Complaint.

February 22, 1995, petitioner filed his Complaint in the United States District Court.

March 14, 1995, Respondents file Motion For Summary Judgment on the grounds that SEIU Local

410 no longer exists and that it was not properly served. The SEIU Local 410 did exist and union was properly served by James E. Crowley, Deputy Sheriff and is attached Appendix D. Petitioner timely opposed this motion. Court allowed respondents motion.

Petitioner requests production of documents. respondents fail to produce documents.

There was a Court Order that parties were to be present in the Court on July 12, 1995.

July 12, 1995, the respondents did not appear in Court. Respondents did not notify neither the Court or petitioner that they were not going to appear.

Petitioner filed a Motion For Sanctions against the Respondents for failure to obey a Court Order. The Court denied the petitioner's motion.

During the discovery period petitioner informed the respondent's attorney Larry Engelstein that the only documents that we was going to use in the action were the documents that were affixed to the Complaint which were the canceled checks for the union dues that was paid and is attached Appendix A.

June 30, 1995, Stephen Reed of the law firm of Kearns & Rubin 60 State Street Boston, Massachusetts case No. 95-10391DPW in bad faith took the deposition of the petitioner. During the taking of the petitioner's deposition Mr. Reed argued and harassed the petitioner. Petitioner

warned Mr. Reed that his arguing and harassing him was making him ill and that he was under the care of a doctor and his misconduct was making him ill, however, just because he told him that he was making him ill the more he continued to argue and harass the petitioner. Mr. Reed caused the petitioner to become ill and leave his office and seek immediate emergency help, affidavit is attached Appendix G.

From that date on the petitioner's health provider advised him not to attend any depositions.

The petitioner always furnished medical evidence to the court when it was requested and is attached Appendix B and Appendix F.

In spite of medical evidence submitted to the District Court and the Appeals Court, petitioner's Complaint is dismissed.

The issues are now before this Court.

---

## REASONS FOR GRANTING THE PETITION

### 1. CERTIORARI SHOULD BE GRANTED BECAUSE THE APPEALS COURT COMMITTED AN ERROR IN LAW IN DISMISSING THE ACTION AND THEIR DECISION WAS ALSO BASED ON ERRORS IN THE FACTS OF THE CASE

The Appeals Court erred in law in basing its decision "We view the dismissal as one for lack of prosecution after Davis unjustifiably refused to be deposed...." . This not the truth. Davis did not refuse to have his deposition taken.

June 30, 1995, the petitioner appeared at the office of Stephen Reed of the law firm of Kearns & Rubin 60 State Street Boston, Massachusetts to have his deposition taken in another action. During the taking of the petitioner's deposition Mr. Reed argued and harassed the petitioner. The petitioner told him that he could not stand his oppressive behavior and his misconduct was making him ill. The petitioner informed him that he was under the physician's care and he would cause him to be rushed to the hospital and he would be responsible if anything happened to him, however, he continued to annoy, embarrass, and made threats against the petitioner.

Because of his oppressive behavior he caused the petitioner harm and injury to his health and well being. Petitioner was forced to obtain medical help immediately after leaving Mr. Reed's office. An individual who drove Davis to obtain immediate medical help affidavit is attached Appendix G.

As a result, petitioner was advised by his physician not to have his deposition taken.

Petitioner submitted to the court medical evidence which clearly informs the court that Davis was not to have his deposition taken for medical reason and is attached Appendix B and Appendix F.

In no way did the petitioner refuse to have his deposition. Petitioner was unable to have his deposition taken because of health reasons caused

by Stephen Reed.

The court erred in law in dismissing the action since not have one's deposition taken is not a criteria to dimiss the action See Edith Tabachnick v. Estate of David Miller Bristol County Probate & Family Court No. 89-P-1790-A1, two attorneys for different parties in the action filed Motions To Dismiss the Action because the plaintiff wilfully refused to have her deposition taken, however, the court did not dismiss the action.

The court erred in law when they based their decision on "plaintiff was engaged in extreme misconduct". The petitioner was not in engaged in any misconduct let alone extreme misconduct.

At all time when the Court requested medical evidence the petitioner furnished medical evidence and is attached Appendix F. The most recent medical evidence was submitted to the court on March 6, 1996, attached Appendix B.

The Appeals Court erred when they based their decision on the following "..in support of his alleged illness, both documents spoke of his illness in conclusory terms. Neither described or documented a specific medical condition ....". This is not true Medical evidence clearly states petitioner's condition attached Appendix E.

The Appeals Court made an error when they

based their decision on "He failed to respond voluntarily and completely to defendants other request." This statement is not true. Petitioner furnished the respondents with all requests.

Petitioner telephoned the respondents attorney Larry Engelstein and informed him that the documents that he was going to use at time of trial were the documents of the canceled checks that were affixed to the petitioner's Complaint and attached Appendix A.

However, as a means of harassment Mr. Engelstein continuously filed the same Motions over and over again and the district court was fully aware that petitioner furnished the respondents with their requests.

Moreover, the respondents never furnished the petitioner with documents he requested and the court did nothing about the petitioner's requests.

Finally, the bottom line is that the petitioner not only was discriminated against by his union, the facts clearly show he was discriminated by the Courts, which resulted in him suffering a miscarriage of justice. See CF. Maty v. Grasselli Chemical Co.,303 U.S. 197, "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by a counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merit" See Hahn v.

Sargent 523 F. 2d 464 (1st Cir. 1975)"The Court must look at the record in the light most favorable to the party opposing the motion". See LeClair v. Silberline 379 Mass. 21 at 23 (1979) "The evidence must be examined in the light most favorable to the plaintiff.

## II. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT COMMITTED AN ERROR IN LAW IN DISMISSING LOCAL #410 FROM THE ACTION

The respondents Local #410 knowingly and wilfully with actual intent to deceive and fraud the court made the following false statements in their motion to dismiss them from the action: "Local 410 does not exist and they were not properly served. See Hilgenberg V. Northrup 33 N.E. 786, 787 134 Ind 92 "An act done with actual intent to deceive another is an act in bad faith". Groh v. Viglet 34 Ohio Law R 132 "Bad faith and fraud are synonymous.

The respondents acted in bad faith when they informed the court that they do not exist. (1) Petitioner was not notified that Local 410 did not exist. (2) If, it was true that Local 410 ceased operations, the plaintiff would have been notified and a refund of dues would have been returned to him since his dues was paid for the year of 1994, however, this was not the case.

The respondents acted in bad faith when

they informed the court that they were not duly served a Copy of the petitioner's Complaint.

Suffolk County Sheriff's Department 11 Beacon Street Boston, Massachusetts I, hereby certify that on 02/24/95 at 9:23 A.M. I served a true and attested copy of the Summons, and Complaint in this action in the following manner: to Writ, by delivering in hand to Wendy Henry, Adm Asst, agent, person in charge at the time of service for the Service Employees International Union AFL-CIO, CLC & Local 410 at 145 Tremont Street Suite 202, Boston Ma by James E. Crowley Deputy Sheriff and attached Appendix D.

The evidence clearly shows that the Local #410 was in operation and were duly served, therefore, the court erred in law in dismissing them from the action.

## III. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT COMMITTED AN ERROR IN LAW WHEN IT DENIED PETITIONER'S MOTION FOR JUDGEMENT AGAINST ALL DEFENDANTS

March 24, 1995, petitiner filed a Motion for Judgment Against All Defendants.

Respondents failed to answer Petitioner's Complaint honestly based on the evidence submitted to the Court. Defendant Joseph Buckley's declaration was merely done with the actual intent to deceive and fraud the Court based on the evidence submitted to the Court. Captions on all documents were incorrect. Affirmative defenses listed by the respondents were merely conjectures

and are completely fruitless.

The respondents had no defense in this action, therefore, Judgment Against All Defendants is appropriate.

**IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT COMMITTED AN ERROR IN LAW WHEN IT DID NOT PLACE SANCTIONS ON THE DEFENDANTS FOR FAILURE TO OBEY A COURT ORDER AND FEDERAL RULES OF CIVIL PROCEDURE**

The court scheduled a date for both parties to be in court.

The respondents did not appear in Court nor did they inform either the Court or the petitioner that they were not going to attend the Court hearing.

In addition, Pursuant to Federal Rules of Civil Procedure 26 (f) the petitioner set-up a conference with the respondents.

Pursuant to Local Rule 26.2 (a) both parties were to exchange documents.

Respondents did not appear for the conference nor was the petitioner notified that they were not attending.

The petitioner filed a Motion For Sanctions against the Defendants. Motion was denied.

The respondents acted in bad faith and disobeyed a Court Order, therefore, sanctions should have been placed on the respondents.

## V. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURTS ARE DENYING JUSTICE TO PRO SE LITIGANTS

The petitioner, Fred Davis, is a senior citizen, unemployed and was unable to obtain an attorney.

Therefore, he was compelled to be a pro se litigant.

Petitioner is appalled that during a pretrial Conference the judge listened to the respondents' attorney, however, she completely annoyed the petitioner.

Respondents disobeyed a Court Order to appear in court. No action was taken against them.

Respondents failed to comply with Federal Rules of Civil Procedure. No action was taken against them.

Respondents knowingly and wilfully acted in bad faith, lied to the court and misrepresented the facts to the Court. No action was taken against them.

Appeals Court's citations of authorities are not applicable in this action. There is not one cite that is applicable in dismissing the action.

Therefore, based on the facts and evidence the petitioner's action should not have been dismissed.

The facts clearly indicate that the Mass-

achusetts Courts are completely out of control and pro se litigants are being discriminated against and denied justice.

In, Haines v. Kerner 404 U.S. 519 (1972) the court should be lenient when the plaintiff is pro se. This is not the case in the Massachusetts Courts. It is the other way around the attorneys get leniency and the pro se litigant gets their cases dismissed.

## VI CERTIORARI SHOULD BE GRANTED BECAUSE PETITIONER WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS OF DUE PROCESS OF THE LAW AND EQUAL PROTECTION OF THE LAW

The United States Constitution Amendment V; states in pertinent part: "cannot be deprived of life, liberty or property without due process of law".

The United States Constitution Amendment XIV: section 1 states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of the law nor deny to any person within its jurisdiction the equal protection of the law."

Due process of law and equal protection of the law is fundamental, constitutional guarantee that all legal proceedings are to be fair.

All legal proceedings in this action were not fair.

The respondents did not proceed in good faith, did not conform with proceedings, did not follow the Federal Rules of Civil Procedure, did not furnish petitioner with requested documents.

The most serious issues were failure to confer with the petitioner when a date was scheduled for the conference and papers were to be exchanged. The respondents did not even notify the petitioner that they were not coming. The Court scheduled a court hearing date and the respondents did not appear, here again either the Court nor the pettioner was notified that they were not going to attend.

The petitioner complied with all procedures attended all court hearings and his action was dismissed just because of illness.

Furthermore, dismissing the action because an individual does not appear for a deposition is not a criteria to dismiss the action. See Edith Tabachnick v. Estate of David Miller Bristol County Probate & Family Court No 89-P-1790-A1, Plaintiff refused to have her deposition taken both attorneys for different parties filed motions to Dismiss the action for refusing to have

her deposition taken and to answer interrogatories, however, the action was not dismissed.

Therefore, petitioner did not received due process of law and equal protection of the law.

Therefore, the petitioner's Constitutional rights were denied.

## CONCLUSION

**WHEREFORE,** Petitioner, Fred Davis, respectfully prays that a Writ of Certiorari issue to review decision of the United States First District Appeals Court and grant the order that the respondent Service Employees International Union AFL-CIO, CLC &Local 410, be ordered to pay the petitioner the sum of four hundred thousand dollars ($400,000.00) for damages. Respondent Joseph Buckley, be ordered to pay the petitioner the sum of four hundred thousand dollars for damages. Punitive damages in the amount of nine hundred thousand dollars ($900,000.00). Legal fees and costs/or as an alternative a trial by jury or any other relief this court deems appropriate to correct this miscarriage of justice.

Respectfully submitted,

Fred Davis
353 Bryant Street
Malden, Ma 02148
(617) 322-8223

# APPENDIX A

0448

FRED DAVIS
353 Bryant Street
Malden, Ma 02148

Feb. 23, 1994

Pay to the
order of Local #410 $210.00

Two Hundred & Ten----------dollars no 100

SHAWMUT

MEMO PAID IN FULL s/Fred Davis

0367

FRED DAVIS
353 Bryant Street
Malden, Ma 02148

Jan. 9, 1993

Pay to the
order of Local #410 $198.00

One hundred & ninety-eight---------- dollars no 100

SHAWMUT

MEMO PAID IN FULL s/Fred Davis

0279

FRED DAVIS
353 Bryant Street
Malden, Ma 02148

Jan. 6, 1992

Pay to the
order of S.E.I.U. Local 410 $186.00

One hundred & eighty-six---------- dollars no 100

SHAWMUT

MEMO UNION DUES 1992 s/Fred Davis

228

FRED DAVIS
353 Bryant Street
Malden, Ma 02148

Jan. 9, 1991

Pay to the
order of S.E.I.U. Local 410 $174.00

One hundred & seventy-four---------- dollars no 100

SHAWMUT

s/Fred Davis

133

FRED DAVIS
353 Bryant Street
Malden, Ma 02148

Dec. 11, 1989

Pay to the
order of S.E.I.U. Local 410----------$162.00

One hundred & sixty-two----------dollars no 100

SHAWMUT

s/Fred Davis

NO. 121

FRED DAVIS
353 Bryant Street
Malden, Ma 02148

Feb. 16, 1989

Pay to the
order of S.E.I.U. Local 410 $162.00

One hundred & sixty-two----------no dollars 100

MUTUAL BANK

Memo Union dues s/Fred Davis

# APPENDIX B

App. 4

John G. Goulding, D.O.
440 Pleasant Street
Malden, Ma 02148

To Whom It may Concern:

I am a physician licensed to practice medicine in the Commonwealth of Massachusetts.

In my opinion, if Mr. Fred Davis of 353 Bryant Street, Malden, Massachusetts is compelled to undergo a legal interrogation i,e. a deposition, at this time, he will suffer severe mental and emotional stress to his physiological detriment.

Signed the sixth day of March, 1996.
s/John G. Goulding, D.O.

# APPENDIX C

App. 5

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action
NO: 95-10381-PBS

FRED DAVIS
Plaintiff

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, ET AL.
Defendants

ORDER OF DISMISSAL

SARIS, D.J.

The above case is hereby DISMISSED without prejudice.

By, the Court,
s/Deborah L. Whitney, Clerk

April 1, 1996

TO: All Counsel

# APPENDIX D

SUFFOLK COUNTY SHERIFF'S DEPARTMENT
11 BEACON STREET
Boston, Massachusetts 02108
Suffolk, ss.

I hereby certify and return that on 02/24/95 at 9:23 A. M. I served a true and attested copy of the Summons and Complaint in this action in the following manner; To wit, by delivering in hand to Wendy Henry, Adm Asst, agent, person in charge at the time of service for the Service Employees International Union AFL-CIO, CLC & Local 410 145 Tremont Street, Suite 202, Boston, Ma. Fees: Service $25.00. Attest $1.00 P&H $1.50, travel $0.80, Total Fees $28.30.

s/James E. Crowley
Deputy Sheriff

# APPENDIX E

App. 7

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

No. 96-1577

FRED DAVIS,

Plaintiff, Appellant,

v.

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO

CLC, ET AL.,

Defendants, Appellees.

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSEtts
(Hon. Patti B. Saris, U.S. District Judge)

---

Before
Torruella, Chief Judge,
Cyr and Stahal, Circuit Judges.

---

Fred Davis on brief pro se.
Eunice H. Washington on Motion for Summary Affirmance and Memorandum of Law in Support of of Motion for Summary Affirmance, for appellee Service Employees International Union, AFL-CIO-ClC.

---

October 23, 1996

---

Per Curiam. Pro se appellant Fred Davis Appeals from the district court's dismissal of his claim of discrimination on the basis of age and religion and from various interlocutory rulings. We view the dismissal as one for lack of prosecution after Davis unjustifiably refused to be deposed over a period of nearly four months. We affirm.

We note initially that Davis is unlikely to be able to refile his Title VII claim of religious discrimination since the 90-day perior after receipt of his right to sue letter has expired. See Wilson v. Grumman Ohio Corp. 815 F. 2d 26, 27-28 (8th Cir. 1987) (Title VII plaintiff may not refile an action, which was dismissed without prejudice after being timely filed, where the refiling did not occur within 90 days after receipt of the right to sue letter). Hence, dismissal of the claim operated with prejudice to Davis. Accordingly, we evaluate the dismissal under case law considering dismissals with prejudice.

A district court may dismiss a case with prejudice for lack of prosecution where the plaintiff has engaged in "extreme misconduct." See Figureroa v. Alegria, 896 F2d 645, 647 ( 1st Cir. 1990). Extreme misconduct may be shown by disobedience of the court order, ignorance of warnings, contumacious conduct.....or some other aggravating circumstance such as prejudice to the defendant, glaring weaknesses in the plain-

tiff's case, and the wasteful expenditure of the district court's time." Id.

The district court did not abuse its discretion in dismissing this case. Davis was arguably "contumacious" in unjustifiably refusing to be deposed. Although he submitted his own affidavit and later a note by a phyician (but not a physician's affidavit, as directed by the court) in support of his alleged illness, both documents spoke of his illness in conclusory terms. Neither described or documented a specific medical condition or history of treatment that would show that Davis was too ill to be deposed. Under the circumstances the court could reasonably have concluded that Davis's refusal to be deposed was willful.

There were additional aggravating circumstances as well. First, besides refusing to be deposed, Davis impeded progress in his case in other ways. He failed to respond voluntarily and completely to defendants' other discovery requests. In every instance, defendants had to apply to the court for an order before Davis responded, and his ultimate responses were incomplete or inadequate. Second, there were "glaring weaknesses" in his claim of discrimination. In his answers to interrogatories, he implied, but did not directly state, that defendant Joseph Buckley had made discriminatory comments when he refused to grieve Davis' simultaneous characterization of Buckley's explanation for not agrieving his discharge -- that Davis had not paid his union dues -- as a "pretext" suggests that no such discriminatory comments

by Buckley. Finally, given Davis's inadequate responses to defendants' written discovery, his un excused refusal to be deposed arguably prejudiced defendants' ability to defend this action, which had been pending for over a year when it was dismissed.

Because the court properly dismissed the action for lack of prosecution. we need not consider the merits of the interlocutory orders challenged on appeal. See Ash v . Cvetkov 739 F 2d 493, 495, (9th Cir 1984), cert. denied, 470 U.S. 1007 (1985) (interlocutory rulings do not merge into the final judgment in cases dismissed for lack of prosecution and so are not reviewable in appeal);accord DuBose v. State of Minnesita, 893 F. 2d 169, 171 (8th Cir. 1990).

Affirmed.

# APPENDIX F

PUBLISHER'S NOTE:

THE FOLLOWING PAGE Is UNAVAILABLE FOR FILMING:

App. 11

# APPENDIX G

**AFFIDAVIT OF GERTRUDE GOROD**

I, Gertrude Gorod, being first duly sworn and say:

1. June 30, 1995, I was present at the law offices of Kearns & Rubin 60 State Street Boston, Massachusetts, during the taking of the plaintiff, Fred Davis' deposition.
2. The plaintiff's deposition was conducted by attorney Stephen Reed.
3. Stephen Reed's conduct was despicable. He conducted the deposition as a German Gestapo.
4. His conduct also violated the Canon Rules.
5. He continuously argued with the plaintiff and would not let him put any thing on the record when he requested it to be part of the record.
6. The plaintiff warned him that he was under the doctor's care, all the more Mr. Reed conducted himself as a German Gestapo, also being oppressive and harassing the plaintiff.
7. The plaintiff took ill and told Mr. Reed to reschedule the deposition. Mr. Reed said, "no we are going to be here all night".
8. Mr. Reed misconduct caused the plaintiff to become ill.
9. The plaintiff was ill and Scott remained with him and I got the car and drove him for medical help.
10. I have read the foregoing and swear that it

is true to the best of my knowledge and belief.

S/Gertrude Gorod

Dated: 7/10/95

On this 10th day of July, 1995, Gertrude Gorod personally appeared before me and being by me first duly sworn, did make oath and say that the matter set forth in the foregoing Affidavit is true to her own knowledge and belief.

s/ Ann Harrington
Notary Public
My Commission expires:
11-16-01